

**ENVIRONMENTAL PROTECTION COMMISSION[567]**

**Adopted and Filed**

Pursuant to the authority of Iowa Code section 455B.263, the Environmental Protection Commission (Commission) hereby amends Chapter 70, “Scope of Title—Definitions—Forms—Rules of Practice,” Chapter 71, “Flood Plain or Floodway Development—When Approval Is Required,” and Chapter 72, “Criteria for Approval,” Iowa Administrative Code.

These amendments change the criteria for the construction of bridges, road embankments, and culverts in a flood plain. Oftentimes, to construct bridges and other structures in a flood plain, the Iowa Department of Transportation (IDOT) and other contractors have had to apply for waivers or variances from the Commission’s rules, a process which could be time-consuming and costly. In response to this concern, the Commission has reviewed its rules and determined that certain portions of existing rules are redundant or unnecessary, and changes could be made that would allow for a higher percentage of compliance with rules. These amendments will reduce the need for these contractors to seek waivers and variances. Equally important, the amendments will not sacrifice public safety.

These amendments add exemptions to the Commission’s flood plain development permit requirements for certain activities, such as excavations installed for conservation practices, and for the installation of signs, utility poles and other similar structures. The exemptions were developed in cooperation with stakeholders such as electric utilities and the Natural Resources Conservation Service (NRCS).

These amendments modify the waiver and variance provision in the flood plain rules so that the provision is consistent with the Iowa Code. These amendments also make minor changes to Chapters 70, 71 and 72 to update definitions, references to Iowa Code sections, forms, and agency contact information.

Notice of Intended Action was published in the Iowa Administrative Bulletin as **ARC 2629C** on July 20, 2016. A public hearing was held on August 10, 2016, at 1 p.m. in Conference Room 2 North of the Wallace State Office Building, 502 East Ninth Street, Des Moines, Iowa, and written comments were accepted through August 10, 2016. Representatives from the Iowa Farm Bureau Federation and the Iowa Drainage District Association attended the public hearing. Public comments were submitted by MidAmerican Energy in support of the proposed amendments. The Iowa Farm Bureau Federation and the Iowa Drainage District Association submitted comments recommending changes to the amendments. The comments and changes are summarized below.

The first comment related to the definitions of “high damage potential” and “low damage potential.” The commenter requested clarification to the definition of “high damage potential” by using the term “significant” to distinguish it from the term “minimal damage” in the definition of “low damage potential.” After review of the rule, a building and how it is used are considered to have high or low damage potential because of the “public damages” that would occur during a flood event. “Public damages,” as defined in rule 567—70.2(455B,481A), means “costs resulting from damage to roads and streets, sewers, water mains, other public utilities and public buildings; expenditures for emergency flood protection, evacuation and relief, rehabilitation and cleanup; losses due to interruption of utilities and transportation routes, and interruption of commerce and employment.”

Each building and its use, whether industrial, commercial, agricultural or recreational, have the potential for expenditures for emergency flood protection, evacuation of people, rehabilitation costs, cleanup costs and the costs related to interruption of commerce and employment. Therefore, the definitions for “high damage potential” and “low damage potential” in 567—70.2(455B,481A) are amended as follows.

The Commission is amending the definition of “high damage potential” by removing the descriptor “constructed of materials” and replacing it with “which, if inundated by flooding, would result in high public damages as determined by the department” to mirror the wording used in the third section of this definition regarding public buildings and building complexes.

In the definition of “low damage potential,” the focus is on buildings and their uses that would not sustain high “public damages” if the buildings were inundated by flood waters. For example, a park shelter is a low damage potential building because of its open air design and because the building’s use is such that damage to the shelter would not result in expenditures for emergency flood protection, costs to evacuate the shelter, rehabilitation and cleanup costs, or interruption of commerce and employment.

The Commission agrees that “structures used by livestock for temporary relief from the weather elements or that are used for short-term livestock management purposes” would be considered “low damage potential.” Therefore, the Commission is amending the definition of “low damage potential” by changing the last part of the final sentence to “park shelters, buildings used for storage of equipment or crops that can be easily removed, and buildings used as temporary shelter for livestock.”

Comments were received regarding Item 7. One commenter requested that a new exemption be added for the broader exclusion of conservation practices installed within 100 feet of a stream or river bank. After analysis of this comment, it was determined that adding a broader exclusion for all conservation practices would not be a logical outgrowth of the rule.

Iowa Code section 455B.275(9) states that “the commission shall establish, by rule, thresholds for dimensions and effects, and any structure, dam, obstruction, deposit, or excavation having smaller dimensions and effects than those established by the commission is not subject to regulation under this section. The thresholds shall be established so that only those structures, dams, obstructions, deposits, or excavations posing a significant threat to the well-being of the public and the environment are subject to regulation.”

Because the term “conservation practice” is not defined in Chapter 70, the phrase “excavations for conservation practices installed to meet or exceed the standards of the USDA Natural Resources Conservation Service (NRCS) Field Office Technical Guide” was used in new paragraph 71.11(1)“e.” This statement implies a defined set of conservation practices where a determination has been made that excavations for conservation practices that meet or exceed the NRCS technical guidance would not pose a significant threat to the well-being of the public and the environment. See Iowa Code section 455B.275(9) for more information.

The commenter requested an exemption for excavations for all conservation practices, not just those that meet or exceed the standards of the NRCS Field Office Technical Guide. Broadening this exemption to all conservation practices would introduce more ambiguity into the rule in that there is no definition for “all conservation practices.” Therefore, the Commission is not adding an exemption for all conservation practices since it may potentially exempt many undefined practices and would not be a logical outgrowth of this rule making.

Two comments were received stating that removal of soil from the excavation area should be allowed to qualify for the exemption stated in Item 7, paragraph 71.11(1)“e.”

The thresholds for determining when a flood plain permit is required are laid out in 567—Chapter 71 by project type. Often, an application for a permit will contain a scope of work that utilizes more than one of the project types listed in 567—Chapter 71. For instance, most excavation projects that fall under 567—71.11(455B) also have a component of the project that falls under 567—71.12(455B), regarding miscellaneous structures, obstructions, or deposits not otherwise provided for in other rules. Therefore, in determining if the project needs a flood plain permit, the department looks at the thresholds in both rules: 567—71.11(455B) and 567—71.12(455B).

Excavation and fill of a flood plain are required to preserve the natural and traditional character of the land and waterway. The Commission agrees with the idea that potential applicants want to put the resulting spoil from an excavation on their adjoining land. Rule 567—71.12(455B) can be applied in this circumstance. If placement of the spoil or fill falls below the thresholds listed in 567—71.12(455B), a flood plain construction permit is not required. For that reason, 567—71.12(455B) already gives applicants the flexibility requested by the Iowa Farm Bureau Federation and the Iowa Drainage District Association to spread a limited amount of spoil on their property without needing to gain a flood plain construction permit. For that reason, the Commission is not changing the exemption in Item 7.

A public comment responsiveness summary addresses all comments and is available upon request.

After analysis and review of this rule making, no impact on jobs has been found.

On balance, the above-discussed amendments reduce the regulatory burden for the regulated community. This is done by rescinding or changing certain flood plain development criteria, providing more exemptions from flood plain development permit requirements, and clarifying how to properly obtain a waiver or variance from applicable rules.

The Commission adopted these amendments on September 20, 2016.

These amendments are intended to implement Iowa Code section 455B.264.

The amendments will become effective on November 16, 2016.

The following amendments are adopted.

ITEM 1. Amend the following definitions in rule ~~567—70.2(455B,481A)~~:

~~“Animal feeding operation” means the same as defined in 567—65.1(455B 459,459B).~~

~~“Animal feeding operation structure;” means the same as defined in 567—65.1(455B 459,459B); means a confinement building, manure storage structure, or egg washwater storage structure.~~

~~“Confinement feeding operation;” means the same as defined in 567—65.1(455B 459,459B); means an animal feeding operation in which animals are confined to areas which are totally roofed.~~

~~“Confinement feeding operation building” or “confinement building;” means the same as defined in 567—65.1(455B 459,459B); means a building used in conjunction with a confinement feeding operation to house animals.~~

~~“Confinement feeding operation structure;” means the same as defined in 567—65.1(455B 459,459B); means an animal feeding operation structure that is part of a confinement feeding operation.~~

~~“High damage potential” means the flood damage potential associated with habitable residential buildings or industrial, commercial, or public buildings or building complexes of which flooding would result in high public damages as determined by the department. the following:~~

~~1. Habitable residential buildings and building complexes which include seasonal residential buildings; or~~

~~2. Industrial, commercial, agricultural, recreational and other similar buildings or building complexes, which, if inundated by flooding, would result in high public damages as determined by the department or which contain high-value equipment or contents that are not easily removed; or~~

~~3. Public buildings or building complexes, which, if inundated by flooding, would result in high public damages as determined by the department.~~

~~“Low damage potential” means all buildings, building complexes or flood plain use uses not defined as maximum, or high, or moderate damage potential where such structures are designed in a manner that inundation by flood waters results in minimal damage to the structure and its contents. Such structures include but are not limited to the following: detached residential garages, sheds, park shelters, buildings used for storage of equipment or crops that can be easily removed, and buildings used as temporary shelter for livestock.~~

~~“Major water source;” means the same as defined in 567—65.1(455B 459,459B); means a water source that is a lake, reservoir, river or stream located within the territorial limits of the state, or any marginal river area adjacent to the state, if the water source is capable of supporting a floating vessel capable of carrying one or more persons during a total of a six-month period in one out of ten years, excluding periods of flooding. Major water sources in the state are listed in Appendix B, Table 1 and Table 2 of 567—Chapter 65.~~

~~“Manure storage structure;” means the same as defined in 567—65.1(455B 459,459B); means a formed manure storage structure or an unformed manure storage structure, as defined in 567—65.1(455B). A manure storage structure does not include an egg washwater storage structure.~~

~~“Water source;” means the same as defined in 567—65.1(455B 459,459B); means any lake, river, creek, ditch or other body of water or channel having definite banks and bed with visible evidence of the flow or occurrence of water, except such lakes or ponds without outlet to which only one landowner is riparian.~~

ITEM 2. Rescind the definition of “Moderate damage potential” in rule **567—70.2(455B,481A)**.

ITEM 3. Rescind rule 567—70.3(17A,455B,481A) and adopt the following **new** rule in lieu thereof:

**567—70.3(17A,455B,481A) Forms.** Any private or public person or agency desiring to secure a permit under this chapter shall file a properly completed application, DNR Form 36. For application and supplemental forms, any private or public person or agency should see <http://www.iowadnr.gov/Environmental-Protection/Land-Quality/Flood-Plain-Management>.

Application forms may also be obtained from:

Flood Plain and Dam Safety Section  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
502 East Ninth Street  
Des Moines, Iowa 50319

ITEM 4. Amend subrule 70.4(2) as follows:

**70.4(2) Applying for a flood plain development permit.** Application for a flood plain development permit shall be made on DNR Form 36 or a reasonable facsimile thereof. The application shall be submitted by or on behalf of the person or persons who have or will have responsibility by reason of ownership, lease, or easement for the property on which the project site is located. The application must be signed by the applicant or a duly authorized agent. Completed applications along with supporting information shall be mailed or otherwise delivered to the Flood Plain ~~Management~~ and Dam Safety Section, Environmental ~~Protection~~ Services Division, Iowa Department of Natural Resources, Wallace State Office Building, 502 East Ninth Street, Des Moines, Iowa 50319.

ITEM 5. Amend paragraph **70.4(3)“a”** as follows:

*a. General requirement of certified plans.* An application shall not be considered complete until sufficient engineering plans have been submitted to enable the department to determine whether the project as proposed satisfies applicable criteria. The engineering plans shall contain information, as specified by the department, which is needed for the department to conduct a technical review pursuant to paragraph 70.5(3) “*b.*” The engineering plans shall include specifications, operation procedures and other information relating to environmental impacts. The engineering plans and other engineering information shall be certified by a ~~registered~~ licensed professional engineer or, if applicable, a ~~registered~~ licensed land surveyor, as required by Iowa Code chapter 542B. Duplicate copies of certified plans are required so that one copy can be returned to the applicant upon approval or disapproval of the application. An additional copy of the certified plans shall be required if the plans are incorporated as part of an approval or disapproval order which is filed with a county recorder.

ITEM 6. Amend **567—Chapter 71**, preamble, as follows:

PREAMBLE: This chapter ~~of these rules~~ contains administrative thresholds which implement the statutory requirement that approval from the department be obtained for any development including construction, maintenance and use of a structure, dam, obstruction, deposit, excavation or “flood control work” on a flood plain or floodway. These administrative thresholds are organized into categories such as “channel changes,” “levees or dikes,” “buildings,” etc. Any doubt concerning whether a project or activity requires approval under these thresholds should be resolved by ~~requesting~~ a request for advice from the department.

The department may delegate regulatory authority to a local government by approving local flood plain regulations (see 567—Chapter 75). To determine whether the department has delegated regulatory authority over a specific category of project at a specific location, an inquiry should be made to:

State Coordinator  
National Flood Insurance Program  
Iowa Department of Natural Resources  
Wallace State Office Building  
Des Moines, Iowa 50319

Telephone: (515)281-8690 725-8200

ITEM 7. Adopt the following **new** paragraph **71.11(1)“e”**:

*e.* Excavations for conservation practices installed to meet or exceed the standards of the USDA Natural Resources Conservation Service (NRCS) Field Office Technical Guide are exempt if all of the following criteria are met:

- (1) The resulting spoil is removed from the flood plain;
- (2) The practices do not reduce the capacity of the flood plain; and
- (3) The practices will not result in water being temporarily or permanently stored above the natural ground line.

These standards may be accessed through the electronic Field Office Technical Guide at <https://efotg.sc.egov.usda.gov/>. They are also available in hard copy at the USDA NRCS office that serves the area where the practice will be implemented.

ITEM 8. Adopt the following **new** subrule 71.12(3):

**71.12(3) Exemptions.** For purposes of this rule, the following project types do not require approval by the department:

- a.* Signs, navigational markers, and aids that have been placed by a public agency to serve the public;
- b.* In-kind replacement of existing utility poles, including H-frame structures that are installed as part of routine maintenance or an emergency;
- c.* New utility poles, including H-frame structures, that fall below the thresholds set forth in 71.12(1) and 71.12(2).

ITEM 9. Amend **567—Chapter 72**, preamble, as follows:

~~This division of these rules establishes~~ The rules within this chapter establish administrative criteria which implement certain statutory criteria, policies, and principles in Iowa Code sections 455B.262, 455B.264, 455B.275 and 455B.277. The specific requirements in these rules must be met for approval of a project or activity in a flood plain or floodway. Additionally, the project or activity must satisfy all of the statutory criteria which Iowa Code sections 455B.262, 455B.264, 455B.275 and 455B.277 require the department to consider. Where a project or activity will result in effects which the department must by statute consider but which are not governed specifically by these rules, the department shall review such effects on a case-by-case basis to determine whether the project or activity meets the statutory criteria.

ITEM 10. Amend rule 567—72.1(455B) as follows:

**567—72.1(455B) Bridges and road embankments.** The following criteria shall apply to the construction, operation, and maintenance of bridges and road embankments.

**72.1(1) Bridges and road embankments affecting low damage potential areas.** For bridges and road embankments affecting floodway or flood plain areas having a low flood damage potential, the following criteria will apply:

~~*a.* Backwater Q50. The maximum allowable backwater for Q50 and lesser floods is limited to 0.75 foot.~~

~~*b. a.* Backwater Q100. The maximum allowable backwater for Q100 is limited to 1.5 feet.~~

~~*e. b.* Freeboard. The minimum freeboard for low superstructure horizontal bridge members above Q50 is 3 feet unless a licensed engineer provides certification that the bridge is designed to withstand the applicable effects of ice and the horizontal stream loads and uplift forces associated with the Q100.~~

~~**72.1(2) Bridges and road embankments affecting moderate damage potential areas.** For bridges and road embankments affecting floodway or flood plain areas occupied by buildings or building complexes having a moderate flood damage potential, the following criteria will apply:~~

~~*a.* The maximum allowable backwater for Q100 is limited to 1.0 foot.~~

~~*b.* The criteria specified in 72.1(1)“a” and “e.”~~

~~**72.1(3) 72.1(2) Bridges and road embankments affecting high or maximum damage potential development.** For bridges and road embankments affecting floodway or flood plain areas occupied by~~

buildings or building complexes having a high or maximum flood damage potential, the following criteria will apply:

~~a. Backwater Q100. Backwater effects are to be minimized for all stages which affect maximum or high flood damage potential buildings or building complexes or for all stages which would tend to reduce the level of protection of certain flood control works, unless acceptable remedial measures are provided or such buildings are removed or the uses relating to human occupancy are prohibited.~~

~~(1) The maximum allowable Q100 backwater for new bridges and road embankments is 1.0 foot.~~

~~(2) The maximum allowable Q100 backwater for replacement bridges and roadway embankments is the lesser of the following: Q100 backwater for the existing bridge and road embankment or 1.0 foot.~~

~~(3) For a new bridge and road embankment located within a stream reach for which the Federal Emergency Management Agency has published a detailed Flood Insurance Study which includes a floodway, the backwater for Q100 shall not exceed the surcharge associated with the delineation for the floodway at that location.~~

~~(4) In no case shall the Q100 backwater effects of a bridge or road embankment reduce the existing level of protection provided by certain flood control works, unless equivalent remedial measures are provided.~~

~~b. Freeboard. In no case shall the criteria specified in 72.1(1)“a” and “e” and 72.1(2)“a” be exceeded. The minimum freeboard for low superstructure horizontal bridge members above Q50 is 3 feet unless a licensed engineer provides certification that the bridge is designed to withstand the applicable effects of ice and the horizontal stream loads and uplift forces associated with the Q100.~~

~~72.1(4) 72.1(3) Bridge and channel change. For bridges and culverts involving channel changes on the floodway of any stream draining at the location of the channel change between 10 and 100 square miles whereby either (i) more than a 500-foot length of the existing channel is being altered or (ii) the length of existing channel being altered is reduced by more than 25 percent, the maximum allowable backwater shall correspond to the limits permitted in 72.1(1), 72.1(2), ~~72.1(3)~~ or ~~72.1(5)~~ 72.1(4) depending upon the associated damage potential.~~

~~72.1(5) 72.1(4) Culverts. The maximum allowable backwater at culvert inlets shall correspond to the limits permitted in 72.1(1), ~~or 72.1(2), or 72.1(3)~~ depending upon the damage potential associated with the affected area. In the case of replacement culverts, the backwater shall not exceed that created by the culvert or waterway crossing being replaced or that specified in 72.1(1), ~~or 72.1(2), or 72.1(3)~~ depending upon the associated damage potential, whichever is greater.~~

~~72.1(6) 72.1(5) Road embankments. The criteria listed in 567—72.11(455B) for miscellaneous flood plain construction projects shall apply to road embankments located on the flood plain but not crossing any stream or river channel.~~

~~72.1(7) 72.1(6) Temporary channel obstructions. Temporary stream crossings and other temporary obstructions usually constructed, operated, and maintained during the construction phase of another flood plain construction project shall meet the following criteria:~~

~~a. Low flow. Said structures will provide for the passage of the prevailing flow in the stream or river.~~

~~b. Flood flow. Said structure shall be designed to fail or otherwise operate in the event of flooding so as to prevent premature overbank flow, or meet the backwater criteria indicated in 72.1(1), ~~or 72.1(2), or 72.1(3).~~~~

~~72.1(8) 72.1(7) Emergency. Repairs or temporary construction required to maintain the operation of a bridge, roadgrade or culverts in time of emergency need not be submitted for prior department approval. Plans of such emergency or temporary construction shall be submitted to the department for review after the event causing the emergency has passed.~~

ITEM 11. Amend subrule 72.5(1) as follows:

~~72.5(1) Minimum protection levels. The minimum level of flood protection for a building depends on the damage potential of the building and contents. “Maximum;” and “high” and “moderate” damage potential classifications are defined in 567—Chapter 70. Criteria for determining minimum levels of protection are as follows:~~

*a.* Buildings with maximum damage potential shall be protected to the level of a flood equivalent to Q500 plus 1 foot. Determination of the elevation of the department regional flood is recommended as an alternative to establish an appropriate level of protection for a building which has maximum damage potential (see discussion of flood frequencies and magnitudes in 567—subrule 75.2(1)).

*b.* Buildings with high damage potential shall be protected to the level of a flood equivalent to Q100 plus 1 foot.

~~*c.* Buildings with moderate damage potential shall be protected to the level of a flood equivalent to Q50.~~

~~*c.*~~ Buildings adjacent to an impoundment shall be protected to the elevation of the top of the dam unless the dam has adequate spillway capacity to discharge the flood corresponding to the damage potential of the building at an elevation below the top of the dam.

~~*d.*~~ Buildings downstream from a dam shall be protected to a level established by the department after due consideration of the hazards posed by the dam for buildings downstream.

ITEM 12. Rescind rule 567—72.31(455B) and adopt the following **new** rule in lieu thereof:

**567—72.31(455B) Variance.** A request for a waiver or variance to this chapter shall be submitted in writing pursuant to 561—Chapter 10. The contents of a petition for waiver or variance shall include information pursuant to 561—10.9(17A,455A).

[Filed 9/21/16, effective 11/16/16]

[Published 10/12/16]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 10/12/16.